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Supreme Court, U.S.
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No. 07-____

In the

Supreme Court of the United States

DARRELL ARNETT, AS ADMINISTRATOR FOR THE ESTATE OF JENNI ARNETT AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

SUSAN COMBS, AS COMPTROLLER FOR THE STATE OF TEXAS; STATE OF TEXAS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Eleventh Amendment preclude federal jurisdiction over a claim by a party seeking return of his or her property wrongfully taken by a state without payment of just compensation?

2. Does a state's continued and unlawful retention of interest earned on property that the state holds in custody for the true owner under an Unclaimed Property Law constitute a concrete, particularized injury that confers standing to pursue claims for injunctive and declaratory relief?

3. Does a state's retention of interest earned on property that the state has taken and holds in custody for the true owner under an Unclaimed Property Law violate the Takings Clause of the Fifth Amendment to the Constitution?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), Petitioner states that all parties appear in the caption of the case on the cover page.

RULE 29.6 STATEMENT

Petitioner has no parents or subsidiaries within the meaning of Supreme Court Rule 29.6.

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Scott Thurm & Pui-Wing Tam, *States Scooping Up Assets From Millions of Americans*, THE WALL STREET JOURNAL, Feb. 4, 2008 25

Darrell Arnett, as Administrator for the Estate of Jenni Arnett, and all others similarly situated, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-2a) is reported at 508 F.3d 1134. The district court's opinions (App., *infra*, 3a-18a, 19a-29a) are reported at 515 F. Supp. 2d 690 and 515 F. Supp. 2d 699.

JURISDICTION

The opinion and judgment of the court of appeals were entered on November 30, 2007. App., *infra*, 1a-2a. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part, "No person shall be . . . deprived of life liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Eleventh Amendment provides, in relevant part, "The Judicial power of the United States shall not be construed to extend to any suit in

law or equity, commenced or prosecuted against one of the United States by Citizens of another State[.]"

The Fourteenth Amendment provides, in relevant part, "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The dispositive portions of the Texas Unclaimed Property Law (the "Act") are codified at Title 6 of the Texas Property Code. This Petition involves the entire Act, focusing on the following provisions: Tex. Prop. Code §§71.302. 72.101, 74.101, 74.301, 74.3011-.3013, 74.304, 74.501, 74.601, 74.602. These provisions are reproduced in the Appendix, at 32a-51a, *infra.*

STATEMENT

The decision below affirms a result that should be intolerable as long as private property is constitutionally protected. Utilizing a system that has counterparts in every jurisdiction in the country, the Texas Unclaimed Property Law permits the state to take from citizens the interest earned on property that the state temporarily holds in a custodial capacity. Although recognizing an obligation to return the custodial property to its rightful owner, the State of Texas nonetheless retains the interest earned on that private property.

Multiple reasons favor a grant of certiorari to review this decision. At its core, the holding below is fundamentally incompatible with this Court's recognition in *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164-65 (1980), that the "earnings of a fund are incidents of ownership in the fund itself and are property just as the fund itself is property." Therefore, as this Court explained, the state "by *ipse dixit,* may not transform private property into public property without compensation, even for the limited duration of the deposit in court [for interpleader actions]." *Id.* at 164. This Court has applied the same analysis in other takings contexts, and sound constitutional doctrine requires the same rule with respect to unclaimed property laws. But the decisions below, and decisions of courts in several states, have carved out a safe haven for governmental taking of property in these circumstances.

The Fifth Circuit reached this result by creating a jurisdictional safe haven that permits the state to avoid appropriate judicial scrutiny of its systematic taking of private property. Based on the premise that the property owner is not entitled to obtain the interest earned on his property during the period of custodianship, the decision below treats the interest instead as state property. Having taken that view, the Fifth Circuit erected an Eleventh Amendment barrier to federal jurisdiction. But that holding conflicts with more discerning decisions of the Second and Ninth Circuits that recognize a different result is required where, as here, a citizen seeks the return of his own property. *See* pages 14-

17, *infra*. Accordingly, this case presents a much needed opportunity for this Court to address the situations in which the Eleventh Amendment bars federal jurisdiction, as explained in *Edelman v. Jordan*, and the different situations in which a federal forum is available to a party seeking restoration of personal property, as explained in *United States v. Lee* and *Malone v. Bowdoin*. *See* pages 15-17, *infra*.

The decision below provides an even more extensive safe haven for the State by precluding federal jurisdiction over claims as to which all agree the Eleventh Amendment is inapplicable, namely, claims for declaratory and injunctive relief. Despite the fact that Texas continues to withhold any interest earned on petitioner's private property while in the custody of the State, the decision below held that Article III standing is lacking. Under the holding in this case, a plaintiff would have to establish a reasonable likelihood of *future* deprivations of property before suit can be brought in federal court. That ruling, which conflicts with prior decisions of this Court and numerous courts of appeals, is plainly worthy of review. *See* pages 21-24, *infra*.

This case presents these core constitutional issues in a context that has far-ranging jurisprudential and practical ramifications. Every state has a statutory system for the collection, custodial safekeeping, and restoration of private property deemed to be "unclaimed." When returning property to the rightful owner, most states withhold the interest earned during the period of

custodianship. Accordingly, the significance of this issue does not arise merely from the amount of unrestored interest (which is considerable), but from the widespread taking of the vital incident of ownership that earned interest represents. When this substantive affront to private property is combined with the pivotal jurisdictional issues in this case, the justification for certiorari should be plain. This Court should grant review to address the fundamental constitutional issues on which the judgment below conflicts with decisions of other circuits.

A. The Unclaimed Property Law

Like similar statutes in all states, the Texas Unclaimed Property Law provides a comprehensive program for the collection, custodial protection, and disposition to the true owner, of property that is presumed to be abandoned. Unlike escheat systems, under the Unclaimed Property Law neither the Comptroller nor the State takes title to the unclaimed property. "[T]he Comptroller's office acts only as custodian for the missing owners, holding the property in trust until it is claimed. Texas never takes legal ownership of the property, so there is no time limit for filing a claim." App., *infra*, 56a; http://www.window.state.tx.us/up/generalinfor.html. As the Comptroller's annual published notification under the statute announces to the public: "It's Your Money." App., *infra*, at 52a.

The Act requires numerous entities annually to report and deliver to the Comptroller property

that is presumed abandoned after a period of inactivity.[1] App., *infra*, 32a-35a, 37a (§§72.101, 74.101, 74.301). The state assumes "custody of the property and responsibility for its safekeeping." *Id.* at 43a (§74.304(a)). The Comptroller also is authorized to invest the unclaimed money, and to "buy, exchange, invest, or reinvest in marketable securities," exercising "the judgment and care of a prudent person." *Id.* at 50a (§74.601(d), (e)). The Comptroller must keep a record that documents unclaimed money, and a record and accounting of unclaimed property other than money. *Id.* at 49a-50a (§74.601(a), (c), (f)).

Following a 1997 amendment to the Act, the Comptroller deposits unclaimed property funds in the State's general revenue fund. *Id.* at 49a-50a (§74.601(b)). Prior to that amendment, funds were deposited to the credit of an "unclaimed money fund." Act of June 3, 1985, 69th Leg., R.S., ch. 230, 1985 Tex. Gen. laws 1129, 1138, *amended by* Act of June 19, 1997, 75th Leg., R.S., ch. 1037, 1997 Tex. Gen. Laws 3875, 3886-87. Despite this change in the temporary location of the funds maintained in the State's custody, there was no change in the requirement that the Comptroller must "use the

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[1] Not all presumptively abandoned property is delivered to the Comptroller. Non-profit cooperative corporations may deliver money to "a scholarship fund for rural students or to stimulate rural economic development." App., *infra*, 41a-43a (§74.3013). Local telephone exchange companies may deliver money to "a scholarship fund for rural students" or "a scholarship fund for urban students" instead of delivering the money to the Comptroller. *Id.* at 37a-40a (§§74.3011, 74.3012).

unclaimed money . . . to pay the claims of persons or states establishing ownership of property in the possession of the comptroller . . . ." App., *infra*, 51a (§74.602).

An owner may file a claim with the Comptroller to claim the owner's property at any time. *Id.* at 32a, 46a-48a (§§71.302, 74.501). If the claim is valid, "the comptroller shall pay the claim" less any applicable statutory handling fee. *Id.* at 46a (§74.501(b)). Although the Act does not limit a "claim" only to principal, *id.*, the State does not pay interest earned on the property during the period of the State's custodianship. App., *infra*, 5a, 21a. The denial of interest has been upheld by the Texas state courts. *Clark v. Strayhorn*, 184 S.W.3d 906 (Tex. App.—Austin, pet. denied), *cert. denied*, 127 S. Ct. 508 (2006).

As a practical matter, therefore, when a bank account is transferred to the State's custody, the owner's entitlement to interest on his property ceases. Similarly, when securities are transferred to the State's custody and then sold, the owner's entitlement to dividend payments ceases and he receives no interest on the proceeds during the period of state custodianship. And, because the state courts have approved this deprivation of property, no remedy exists in state administrative or judicial process.

B. Arnett's Claim

Petitioner Arnett, a resident of Tennessee, is the administrator of his grandmother's estate. In

that capacity, he filed an unclaimed property claim for the return of property valued at $51,550.00. R. 1/9.[2] After deducting a statutory 1.5% handling fee, the Comptroller returned $50,776.75. But the Comptroller did not return any interest that had accrued on Arnett's property. Accordingly, Arnett, on behalf of himself and all others similarly situated, filed suit against the Comptroller and the State asserting that the State wrongfully fails to return revenue generated by unclaimed property while in the custodial possession of the respondents under the Unclaimed Property Law. R. 1/8.

The complaint asserted several causes of action, including claims for taking of private property for public use under the Fifth and Fourteenth Amendments of the United States Constitution and Article 1, Section 17, of the Texas Constitution. R. 1/18-24. With respect to relief, the complaint requested restitution and disgorgement of the revenue generated by the unclaimed property, a declaration that the Unclaimed Property Law is unconstitutional to the extent that it does not provide for compensation for the taking of private property, *i.e.*, the interest or revenue generated by unclaimed property while held by the State, a permanent injunction, and an accounting. R. 1/24-25.

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[2] In this petition, the Record filed in the court of appeals will be cited as "R. [volume]/[page]."

C. The Lower Court Proceedings

In the absence of any discovery, the Comptroller moved for partial summary judgment on the basis of Eleventh Amendment immunity with respect to all of the claims seeking monetary relief.[3] R. 1/161. The district court rejected Arnett's contention that the Eleventh Amendment did not bar his claim for monetary relief because he sought return of his own property and did not seek public funds from the State. Accordingly, the court granted the Comptroller's motion for summary judgment as to all claims for monetary relief. App., *infra*, 15a.

Specifically, the court rejected Arnett's contention, drawn from *Taylor v. Westly*, 402 F.3d 924 (9th Cir. 2005), that the Eleventh Amendment did not bar his monetary claims because the unclaimed property and revenue from that property at all times remained the property of the true owner and not the property of the State. The district court's analysis was as follows: First, the court noted that, by statute, unclaimed property funds are placed in the State's general revenue fund and are subject to legislative appropriation. App., *infra*, 10a-11a.[4] The court, therefore, sought to distinguish *Taylor* on the premise that the Texas provision requiring the

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3 The Comptroller acknowledged that the Eleventh Amendment posed no bar to Arnett's claims for prospective injunctive and declaratory relief. R. 1/150; App., *infra*, 8a n.1.

4 The Texas Act expressly requires the Comptroller to "assume custody of the property and responsibility for its safekeeping." App., *infra*, 43a (§74.304(a)).

Comptroller to deposit unclaimed property funds into the general revenue fund and not into a separate trust fund constituted a dispositive difference from the California statute. For this point, the district court relied on the analysis in *Clark*. App., *infra*, 12a. Based on this rationale, the district court concluded that the Comptroller is entitled to Eleventh Amendment protection from Arnett's claims for monetary relief and granted the Comptroller's motion for summary judgment as to those claims. *Id.* 13a, 18a.

Along with granting the Comptroller's summary judgment motion, the district court denied Arnett's motion for class certification. *Id.* at 18a. With respect to the requirements of Rule 23, the district court concluded that Arnett could not adequately represent the interests of a class seeking the only available relief, declaratory and prospective injunctive relief. This conclusion rested entirely on the premise that Arnett "does not, nor does the Court reasonably believe he can, contend he will be likely to have property subject to the Texas Unclaimed Property Law in the future." *Id.* at 16a. But the court did not address Arnett's contention that his claim seeks to remedy the state's current and ongoing deprivation of property without just compensation by failing to return interest already earned on his property.

Based on the district court's determination that Arnett was unlikely to have property subject to the Unclaimed Property Law in the future, the Comptroller filed a second motion for summary judgment and sought dismissal of the remaining

claims for lack of jurisdiction. R. 2/280. The core of that motion was the Comptroller's contention that there was no live case or controversy since – as the court had previously observed incorrectly – Arnett's claim related to a potential future deprivation of property. In response, Arnett again pointed to the fact that his claim is based on the allegation that he continues to suffer a "concrete, actual injury" in the form of financial harm from the State's continued, unlawful retention of his property. R. 2/285, 304. Relying on its earlier conclusion that Arnett is unlikely to have property subject to the Act in the future, the district court held that he lacked standing to pursue his claims for declaratory and injunctive relief. App., *infra*, 25a-27a. The district court granted the Comptroller's summary judgment motion and entered a final judgment dismissing the case in its entirety. *Id.* at 28a, 30a-31a.

Arnett appealed to the Fifth Circuit. In a published precedential opinion, the court of appeals affirmed for the reasons stated in the district court orders. App., *infra*, 1a-2a.

REASONS FOR GRANTING THE WRIT

The judgment in this case conflicts with prior decisions of this Court and decisions of other courts of appeals on frequently recurring constitutional issues that have both jurisdictional and substantive importance. With respect to the vital concerns of federalism embodied in the Eleventh Amendment, this case provides an apt vehicle for addressing the inherent tension between this Court's decision in *Edelman v. Jordan* and the "*Lee-Malone* exception"

recognized in *United States v. Lee*, 106 U.S. 196 (1882) and *Malone v. Bowdoin*, 369 U.S. 643 (1962). The need for reconciling the parameters of the otherwise applicable rule and the exception is particularly pressing here, because the decision below conflicts with *Taylor v. Westly*, 402 F.3d 924 (9th Cir. 2005) and *In re Deposit Insurance Agency*, 482 F.3d 612 (2d Cir. 2007) on precisely this point. Where, as here, petitioner is seeking the return of his own property, the Eleventh Amendment should interpose no bar. Unless review is granted and the decision below is reversed, states will have a license to obliterate property rights with total impunity by the simple mechanism of cycling custodial or seized property through the state treasury. Under the decision below, the victimized citizen will have no remedy in federal court for money damages even when, as is the case here, the state courts see no constitutional infirmity.[5]

With respect to the separate constitutional issue of Article III standing to pursue claims for declaratory and injunctive relief, the decision below runs counter to this Court's consistent recitations of

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[5] In the court of appeals, respondents argued that Arnett lacked standing to bring his claims because he failed to exhaust his state remedies, relying on *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985). A petition for writ of certiorari that challenges the application of *Williamson County* to require a property owner to seek redress in state court to ripen a federal takings claim is pending in *Peters v. Village of Clifton*, No. 07-635. Because resolution of that question would impact this case, the Court should hold Arnett's petition pending the resolution of *Peters*, No. 07-635.

the applicable standards in *Lujan v. Defenders of Wildlife*, *Allen v. Wright*, and *Valley Forge Christian College v. Americans United for Separation of Church & State*. In reaching its erroneous conclusion, the decision below conflicts at various points in its analysis with opinions of the First, Sixth, Ninth and Tenth Circuits. *See* pages 22-24, *infra*.

The substantive underpinning for the incorrect jurisdictional rulings in this case is the equally erroneous conclusion that the Constitution condones governmental taking (without just compensation) of an owner's entitlement to receive the interest earned on his property. This Court's decisions in *Webb's Fabulous Pharmacy, Inc. v. Beckwith*, *Phillips v. Washington Legal Foundation*, and *Brown v. Legal Foundation of Washington* are to the contrary. Indeed, in related contexts, this Court has applied the long-settled rule that "interest follows principal," a rule that is entrenched in state law throughout the country in a host of similar contexts, but not in the circumstances that exist in this case: interest on property held in a custodial capacity for return to the owner under the authority of unclaimed property statutes. Courts in numerous states have accepted the notion that the state government can retain the interest earned on such private property. *See* pages 25-27, *infra*. The issue is, accordingly, one that will have an immediate impact on many states, and potentially all states. Certiorari is fully warranted.

I. A CONFLICT EXISTS REGARDING THE APPLICATION OF *EDELMAN V. JORDAN*.

In holding that the Comptroller is entitled to Eleventh Amendment protection in this case, the decision below conflicts with the Ninth Circuit's decisions in not only *Taylor*, but also *Suever v. Connell*, 439 F.3d 1142 (9th Cir. 2006). The *Taylor* plaintiffs sued the state controller for return of their stock held as unclaimed property or a refund of proceeds from the stock sold by the state. 402 F.3d at 925-26. The controller had sold the stock and deposited the money received with the State Treasury in an Unclaimed Property Fund. *Id.* at 926. The district court determined that the Eleventh Amendment barred the plaintiffs' claims. *Id.* at 929. The Ninth Circuit disagreed, concluding that the Eleventh Amendment poses no jurisdictional bar to plaintiffs' claims for return of their own property in a case alleging that the state official acted in an *ultra vires* or unconstitutional manner. *Id.* at 935; *see also Suever*, 439 F.3d at 1147-48 ("the Eleventh Amendment does not bar the class's claims requesting the return of the class's property").

Taylor correctly ascertained that the plaintiffs sought return of their own property, that is, proceeds from the sale of stock that the state took as unclaimed property. 402 F.3d at 926-27. The fact that the controller had sold the shares and deposited the proceeds into the State Treasury did not change the result. As the Ninth Circuit observed, the stock, the unclaimed property, did not permanently escheat to the state. Rather, "the Controller must 'safeguard

and conserve' unclaimed property" for the interests of all parties having an interest in the property. *Id.* at 930 (quoting CAL. CIV. PROC. CODE §1365).[6] The underpinning of the determination that the plaintiffs sought their own property was the fact that the property had not permanently escheated to the state and that the state assumed custody and control of the property for the true owner's benefit. *Taylor*, 402 F.3d at 931-32.

Based on the determination that the state held was plaintiffs' own money, the Ninth Circuit held that the case was controlled by *Lee*, as tempered by *Malone*. Under "the *Lee-Malone* exception" to Eleventh Amendment immunity, there is no bar to a plaintiff seeking return of his or her own property that a state official wrongfully holds. *Taylor*, 402 F.3d at 926-27. The plaintiffs neither sought property unquestionably owned by the state nor sought property to which title was disputed. *Id.* Because their claims demanded return of their own

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[6] The Ninth Circuit concluded that §1365 established a custodial trust. *Taylor*, 402 F.3d at 931. Although the California statutory provision does not use the word "trust," §1365 requires the state to assume the "care and custody of all" unclaimed property delivered to the state "for the benefit of those" entitled to the property. CAL. CIV. PROC. CODE §1365. The Ninth Circuit relied on this language in concluding that the custodial responsibility established that ownership remained with the plaintiffs; the court's conclusion did not turn on the fact that the funds were placed in an Unclaimed Property Fund. *Taylor*, 402 F.3d at 931. The Texas Unclaimed Property Law similarly requires that the state "assume custody of the property and responsibility for its safekeeping." App., *infra*, 43a (§74.304(a)).

property and not compensation for property for which full title had passed to the state, they were claims "for return under *Lee* and *Malone*" and not claims "for compensation from the state's general fund under *Edelman*." *Id.* at 935-36; *see also Suever*, 439 F.3d at 1148 ("the class's request that the Controller return the members' property is not barred by the State's sovereign immunity"). Accordingly, the Ninth Circuit correctly concluded that the Eleventh Amendment and *Edelman* did not bar the plaintiffs' monetary claims.

In reaching a different conclusion, the lower courts in this case sought to distinguish *Taylor* on grounds that are entirely specious. Contrary to the decisions below, both the Texas and California statutes create a temporary custodial responsibility to hold property for return to the true owner. And both statutes create this custodial relationship without expressly labeling it as a "trust." In distinguishing the cases because the Texas Act does not use the word "trust," the courts below are incorrect and in conflict with the Ninth Circuit.

The Fifth Circuit decision also conflicts with that of the Second Circuit in *In re Deposit Insurance Agency*, 482 F.3d 612 (2d Cir. 2007). A bankruptcy administrator for foreign banks sought assets and other property to which the Superintendent of Banks for the State of New York claimed title. The Superintendent argued that the suit to recover the assets was a suit to quiet title that the Eleventh Amendment barred. *Id.* at 619. The Second Circuit disagreed, concluding that the Superintendent's claim was not one of title, but one of "a right to

custody of the assets for purposes of administration during insolvency proceedings." *Id.* Accordingly, the Second Circuit concluded that the case could proceed under both *Lee* and *Tindal v. Wesley*, 167 U.S. 204 (1897), as one seeking to dispossess a state official of assets held in custody, but not one to determine title to the assets. *Deposit Ins.*, 482 F.3d at 619-20. That result, the Second Circuit explained, is mandated by the rule that a federal court may "provid[e] relief from governmental officials taking illegal possession of property in violation of federal law." *Id.* at 619.

There should be no doubt that the decision below in this case conflicts with the Second and Ninth Circuits on this important constitutional issue. Under the Texas Act, the Comptroller holds unclaimed property in custody for the true owner. The property never permanently escheats to the state. The proceeds from Arnett's unclaimed property remained in the State's custody until claimed by Arnett. Although "housed" in the State's general revenue fund, the proceeds at all times were subject to a claim by Arnett and payment by the Comptroller. App., *infra*, 46a-48a, 51a (§§74.501, 74.602). Arnett seeks return of his own property, that is, the interest that was earned by, and "follows," his principal. His claim, therefore, is one for restoration of private property under *Lee* and *Malone*, as the Ninth Circuit correctly concluded in *Taylor*.

Aside from this important substantive issue on which the lower federal courts are in conflict, this case also warrants review because of the manner in which the courts below injected a premature

assessment of the merits into the jurisdictional analysis. In short, the decision below rests on the premise that Arnett does not own the interest that accrued on his property. But that conclusion depends entirely on resolving the merits of Arnett's claim: whether the failure to restore the interest on his property constituted a taking without just compensation. In utilizing that substantive premise, the lower courts commingled the merits of the case in the jurisdictional inquiry. *See Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (merits of a case are irrelevant to the jurisdictional inquiry).

In any event, the Fifth Circuit's conclusion that the interest on Arnett's property goes to the state is directly in conflict with well-established law that interest follows principal. This Court has expressly applied the "interest follows principal" rule in similar contexts. In *Phillips v. Washington Legal Foundation*, 524 U.S. 156, 169-70 (1998), this Court applied the rule to hold that the Takings Clause prohibited the State of Texas from keeping interest generated by private money deposited in a state-sponsored account. The Court also invoked the "interest follows principal" rule to hold that the Takings Clause prohibits states from keeping interest generated by private money held directly by the state in a state fund. *Webb's Fabulous Pharmacies*, 449 U.S. at 164-65; *see Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (concluding that the interest earned on an IOLTA account is the private property of the principal's owner and the interest was taken for public use

when turned over to the foundation). These cases demonstrate that this is more than simply a state-law issue; the deprivation of interest earned on property – even when the property is held by the state in a custodial capacity – presents a constitutional issue with ramifications for every state.

Specifically with respect to Texas, this Court previously has observed that a property owner's right to interest generated by his own property pre-dates the Constitution and is "firmly embedded" in Texas common law. *Phillips*, 524 U.S. at 165. *See also Sellers v. Harris County*, 483 S.W.2d 242, 243 (Tex. 1972) (property owner's right to interest earned on his property); *City of Pearland v. Reliant Energy Entex*, 62 S.W.3d 253, 256 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (same).

Under settled doctrine, therefore, it should follow that revenue earned on unclaimed property is the property of the true owner. In this case, the true owner is petitioner Arnett. He indisputably owns and always has owned the principal that generated that interest. Texas law explicitly recognizes that the Unclaimed Property Law does not divest the "true owner" of title to property turned over to the State pursuant to that law. *Clark*, 184 S.W.3d at 911 (*citing Tex. Workers' Comp. Comm'n v. Tex. Mun. League Intergovernmental Risk Pool*, 38 S.W.3d 591, 597-98 (Tex. App.—Austin 2000), *aff'd*, 74 S.W.3d 377 (Tex. 2002)). Rather than taking title, the State acts only as custodian of the property and is responsible for its safe keeping until the true owner requests its return. App., *infra*, 43a (§74.304(a));

State v. Liquidating Trustees of Republic Petroleum Co., 510 S.W.2d 311, 313-14 (Tex. 1974); *see also Clark*, 184 S.W.3d at 911 (stating that the language of the statute confirmed the custodial role of the State). Because interest is the incident of the principal, the interest belongs to the principal's owner. *See, e.g., Webb's Fabulous Pharmacies*, 449 U.S. at 162; *City of Pearland*, 62 S.W.3d at 256.

Thus, the decision below conflicts with decisions of other circuits in application of sovereign immunity principles and this Court's decisions in *Phillips*, *Webb's Fabulous Pharmacies*, and *Brown*. The lower courts' only stated basis for operation of sovereign immunity is the happenstance that under the Texas statutory regime, the property may be converted to money that temporarily resides in the State's general funds, despite a continuing obligation that the funds must be used for payment to claimants under the Unclaimed Property Law.[7] But that passage through the general funds neither changes the nature or title of the property nor implicates the doctrine of sovereign immunity. The reason is straightforward: the statute provides that the only use of unclaimed property funds temporarily

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[7] In addition to Texas, two other states require deposit of unclaimed property funds directly into a general revenue fund. *See* DEL. CODE tit. 12, §1131; MINN. STAT. §345.48; TEX. PROP. CODE §74.601(b). Another state provides for deposit of funds into a school fund. WIS. STAT. §177.23. The majority of states provide for deposit of some amount of unclaimed property funds into a separate account for payment of claims. *See, e.g.*, CAL. CIV. PROC. CODE §1564(a).

held by the state is payment to the property's rightful owners.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT AND OTHER CIRCUITS ON THE ISSUE OF STANDING FOR DECLARATORY AND INJUNCTIVE RELIEF.

The courts below held that Arnett lacked standing to pursue his claims for prospective and injunctive relief because, in the words of the district court, it did not "reasonably believe" that Arnett did, or could, "contend he will be likely to have property subject to the Texas Unclaimed Property Law in the future." App., *infra*, 16a (emphasis added). Reasoning that Arnett was not entitled to the interest that accrued on the $51,550.00 in principal to which Arnett never lost title, the court concluded that Arnett did not currently have a concrete, particularized injury flowing from the State's continued retention of the interest generated on his unclaimed property. *Id.* at 16a. Under the decisions below, the only claim for prospective injunctive or declaratory relief that Arnett might have would arise in the future. *Id.*

That ruling conflicts with prior cases on the issue of standing. Because the State continues to hold Arnett's property, Arnett suffers a continuing, immediate and concrete constitutional injury and, therefore does indeed have standing. Under standards established in prior decisions of this Court and applied consistently by other courts of appeals,

there are three elements required to satisfy the "irreducible constitutional minimum of standing." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-60 (1992). At the pleadings stage, which was as far as the district court allowed this case to progress, general factual allegations of injury resulting or arising from the defendant's conduct are sufficient to satisfy these requisites. *See id.* at 561; *Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 570 (6th Cir. 2005); *N.A.A.C.P., Boston Chapter v. Harris*, 607 F.2d 514, 526 (1st Cir. 1979).

Under the standards applied in other circuits, petitioner Arnett plainly has standing to pursue his claims for declaratory and injunctive relief. First, he suffered an injury in fact, injury that is concrete and particularized, as well as actual or imminent and not hypothetical. *See e.g., Lujan*, 504 U.S. at 559-60; *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); *Valley Forge Christian College v. Americans United for Separation of Church & State*, 454 U.S. 464, 471-73 (1982). The injury that Arnett has suffered, and continues to suffer, is loss of the interest generated by his property while it was held in the State's custody. The loss of interest generated by Arnett's principal of $51,550.00 is not hypothetical and is actual and concrete.

Second, petitioner's injury is "fairly traceable" to the defendant's conduct. *See Lujan*, 504 U.S. at 559-60; *Allen*, 468 U.S. at 750-51; *Valley Forge Christian College*, 454 U.S. at 471-73. The State's retention of interest generated by Arnett's principal is, at the very least, fairly traceable to the State. It is the State's failure and refusal to return to Arnett

the interest generated by his property that directly and solely caused his injury.

Finally, petitioner's injury is capable of redress by a favorable decision. *See Lujan*, 504 U.S. at 559-60; *Allen*, 468 U.S. at 750-51; *Valley Forge Christian College*, 454 U.S. at 471-73. There can be no doubt that the declaratory and injunctive relief petitioner seeks would redress his injury. The complaint requests a declaration that the Texas Unclaimed Property Law is unconstitutional and also seeks an injunction mandating that the State be required to return the interest, and/or other revenue, that follows principal when such principal is returned to its owner.

Indeed, petitioner's standing to pursue his claims for declaratory and injunctive relief was so clear that respondents did not move to dismiss on these grounds until after the district court's gratuitous – and incorrect – ruling that petitioner's lack of entitlement to interest (a premature disposition on the merits) affected the jurisdictional analysis. App., *infra*, 24a; R. 2/280. Even in the court of appeals, respondents' argument on standing relied on the proposition he failed to exhaust state remedies by suing in state court. But as respondents explicitly acknowledged, there was absolutely no prospect of obtaining relief in state court, which had already held that interest is not returned to the owner under the Act. *Clark*, 184 S.W.3d at 913.

Therefore, because Arnett does have an actual and particularized injury that is fairly traceable to respondents and that may be redressed by a

favorable court ruling, the Fifth Circuit's endorsement of the district court's erroneous conclusion that Arnett does not have standing conflicts with the decisions of other courts of appeals. *See Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 631 n.9 (10th Cir. 1998) (concluding that money lost from state's permanent school fund through operation of a state constitutional amendment was a sufficient concrete and imminent injury to confer standing on individual plaintiffs); *see also Taylor v. Westly*, 488 F.3d 1197 (9th Cir. 2007) (concluding that plaintiffs who sued for return of unclaimed property or its proceeds had standing to pursue their claim for injunctive relief).

III. THE IMPORTANT ISSUES IN THIS CASE WILL IMPACT NUMEROUS CASES WITH RELATED ISSUES IN ALL FIFTY STATES.

Review is surely merited here because the decision below provides a roadmap to states for taking private property without just compensation, providing no state remedy to obtain the relief sought, and avoiding federal court jurisdiction for the vindication of constitutional rights. Even if the practical effect of this ruling did not extend beyond unclaimed property laws, review would still be warranted. Each of the fifty states has some form of unclaimed property provision. A majority of states either have statutes that expressly exclude interest[8]

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[8] *See e.g.* ARK. CODE ANN. §§18-28-211; DEL. CODE ANN. tit. 12, §1145; GA. CODE ANN. §44-12-220(c); NEB. REV. STAT. §69-1314; OKLA. STAT., tit. 60, §665; S.D. CODIFIED LAWS §43-41B-25(c).

or are silent on the subject.[9] Many states whose statutes are silent in fact do not return interest to the property owner, and all would be free to follow that course unless review is granted and the decision below is reversed. Other states allow for recovery of interest but only in limited circumstances or capped at a statutory percentage.[10] Nationwide, the aggregate monetary value of the unclaimed property held is vast: As of June 2006, the fifty states collectively held approximately $35 billion in unclaimed property. Scott Thurm & Pui-Wing Tam, *States Scooping Up Assets From Millions of Americans*, THE WALL STREET JOURNAL, Feb. 4, 2008, at A1. In fiscal 2006 alone, Texas collected approximately $148 million in unclaimed property,

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[9] *See e.g.* ALA. CODE §35-12-70 *et seq.;* D.C. CODE §41-201 *et seq.* ; FLA. STAT. §717.001 *et seq.*; HAW. REV. STAT. §523A-1 765; ILL. COMP. STAT. 1025/1-30; IND. CODE §32-34-1-1 *et seq.*; IOWA CODE §556.1 *et seq.*: KY. REV. STAT. ANN. §393.010 *et seq.* ; MD. CODE ANN. §17-101 *et seq.*; MICH. COMP. LAWS §567.221 *et seq* ; MINN. STAT. §345.31 *et seq.*; MONT. CODE ANN. §70-9-801 *et seq.*; N.H. REV. STAT. ANN. §471-C:1 *et seq.*; N.C. GEN. STAT. §116B-51 *et seq.*; N.D. CENT. CODE §47-30.1-01 *et seq.*; OR. REV. STAT. §98.260 *et seq.*; 72 P. S. §1301.1 *et seq.*; TEX PROP. CODE ANN. §74.001 *et seq.*; UTAH CODE ANN. §67-4a-101 *et seq.*; VT. STAT. ANN. tit. 27, §1241 *et seq. ;* WYO. STAT. ANN. § 34-24-101 *et seq.*

[10] COLO. REV. STAT. §38-13-117(3) (repayment limited to 6%); IDAHO CODE ANN. §14-524(3); LA. REV. STAT. ANN. § 9:163 (no interest on property other than a 5% maximum repayment on interest-bearing accounts); N.M. STAT. §7-8A-11 (repayment limited to 5%); OHIO REV. CODE ANN. § 169.08(D) (no interest on property taken after July 25, 1991); R.I. GEN. LAWS §33-21.1-24(c) (repayment limited to 5%); VA. CODE ANN. §55-210.21(c) (repayment limited to 5%); W. VA. CODE §36-8-11(1) (repayment limited to 4%).

bringing the total amount it holds in custody to approximately $1.5 billion. *Id.*; *see generally* http://www.window.state.tx.us/taxbud/bre2008/html/table-a3-html.

The conclusion underlying the lower courts' disposition of Arnett's claims – that the state owns the interest or revenue that accrues on unclaimed property while in the state's custody – has enormous financial and jurisprudential consequences. The need for review is growing because state courts around the country have reached the conclusion – flatly incompatible with constitutional imperatives – that the true owner of unclaimed property is not entitled to receive the interest that accrues on the property while held by a state. Most recently, the North Carolina Court of Appeal held that the state's retention of interest earned on unclaimed property while in the state's possession was not a taking in violation of the Constitution. *Rowlette v. State*, No. COA06-1036, 2008 N.C. App. LEXIS 284 *21-22 (N.C. App. Feb. 19, 2008). As have other courts, the North Carolina court declined to apply the well-established rule that interest follows principal, as articulated in *Webb's Fabulous Pharmacies*, *Phillips*, and *Brown*. *Id.* at **8-14; *see also Smyth v. Carter*, 845 N.E.2d 219 (Ind. App. 2006) (concluding that state's retention of interest was not a taking that required compensation because "the owner's failure to act, and not the State's exercise of its sovereign power caused the deprivation"), *cert. denied*, 127 S. Ct. 1155 (2007); *Sogg v. Director, Ohio Dep't of Comm.*, No. 06AP-883, 2007 Ohio App. LEXIS 2829 (Ohio App. June 21, 2007) (concluding that the

state's retention of interest on unclaimed funds due to the owner's failure to take action regarding the property is not a taking that requires compensation), *appeal accepted*, 876 N.E. 968 (Ohio 2007); *Hooks v. Kennedy*, 961 So. 2d 425 (La. App.) ("the state is afforded the benefit of retaining . . . the interest earned from post-abandonment actions"), *writ denied*, 967 So. 2d 507 (La. 2007); *Simon v. Wiesmann*, No. 04-941, 2007 U.S. Dist. LEXIS 63417 (E.D. Penn. Aug. 27, 2007) (concluding that *Phillips* and *Brown* are inapposite to the type of takings claims plaintiffs assert and that they are not entitled to interest on property held by the state under the unclaimed property law); *but see Suever v. Connell*, No. C 03-00156, 2007 U.S. Dist. LEXIS 79265 (C.D. Cal. Oct. 12, 2007) (concluding that plaintiffs were entitled to a declaration that the controller is obligated to return interest to persons who reclaim property because the principal "at all times remained the property of private individuals and not the state, [and] so too did the interest").

Various courts have determined that a state's retention of interest earned on unclaimed property is not a taking that requires compensation based on an unwarranted extension of this Court's decision in *Texaco, Inc. v. Short*, 454 U.S. 516 (1982). *Texaco* does not require the result reached by those courts. In *Texaco*, this Court let stand a state law that allowed a property's mineral rights to be extinguished and revert to the surface owner if the owner of the mineral rights failed to develop them within a set time period, determining that the state did take property without just compensation. *Id.* at

518. Unlike this case, however, *Texaco* involved a transfer of title from one private party to another. *Id.* at 518-19. Moreover, the transfer was complete and vested title in the new owners. *Id.* Crucial to the determination that there was no "taking" was the fact of the owner's abandonment of the property. "[A]fter abandonment, the former owner retains no interest for which he may claim compensation." *Id.* at 530. The statutory scheme at issue in *Texaco* is wholly different from the custodial scheme under the Unclaimed Property Law in which title never passes from a owner. *Texaco* also based its holding on the strong public policy favoring development of natural-resources, which is similarly inapplicable to this case. Accordingly, *Texaco* is inapposite: it is indisputable that Arnett never lost title to his property, and the clear public policy underlying the Taking Clause is that government cannot commandeer private property for public use without justly compensating the owner.

Unlike the abandoned property in *Texaco*, in this case the interest, as well as the principal, remains the property of the true owner. The instant case, therefore, has significance not only for resolution of the "interest follows principal" question but also the ability of a true owner to recover his or her property in a federal forum.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider holding this case pending the disposition in *Peters v. Village of Clifton*, No. 07-635.

Respectfully submitted.

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February 28, 2008

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
November 30, 2007

Charles R. Fulbruge III
Clerk

No. 06-51103

DARRELL ARNETT, as Administrator for the Estate of Jenni Arnett and all other similarly situated,

Plaintiff-Appellant,

v.

SUSAN COMBS, as Comptroller for the State of Texas; STATE OF TEXAS,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

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Before KING, GARZA, and BENAVIDES, Circuit Judges:

PER CURIAM:

This case presents a challenge to the Texas Unclaimed Property Law. TEX. PROP. CODE ANN. §§ 72.001-75.102 (Vernon 2007).

The plaintiff-appellant Darrell Arnett brought

this class action against the Texas State Comptroller and the State of Texas, on behalf of himself and others similarly situated, alleging among other claims that the Comptroller's practice of retaining the revenue generated from unclaimed property held by the State pursuant to its Unclaimed Property Law constitutes a taking without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. As relief, Arnett sought the return of the revenue generated from the unclaimed property, an injunction prohibiting the State from retaining any future revenue from the unclaimed property, a declaratory judgment that the Unclaimed Property Law is unconstitutional, an accounting of the revenue generated, and attorney's fees.

The district court dismissed Arnett's claims for monetary relief on Eleventh Amendment immunity grounds. The court also denied Arnett's motion for class certification. The district court concluded that, as to the claims for declaratory and injunctive relief, Arnett was not an adequate class representative and class certification would serve no useful purpose. In a subsequent order, the court found that Arnett lacked standing to seek declaratory or injunctive relief and dismissed the remainder of the action. Arnett appealed.

We AFFIRM for the reasons stated by the district court in its orders dated July 26, 2006 and May 16, 2006. *See Arnett v. Strayhorn*, ____ F. Supp. 2d ____, 2006 WL 4869165 (W.D. Tex. July 26, 2006); *Arnett v. Strayhorn*, ____ F. Supp. 2d ____, 2006 WL 4869166 (W.D. Tex. May 16, 2006).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

FILED
2006 MAY 16 PM 2:42
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY

DARRELL ARNETT, as Administrator of the Estate of JENNI ARNETT, and all others similarly situated,

Plaintiff,

-v. -

CAROLE KEETON STRAYHORN, as Comptroller for the State of Texas, and the STATE OF TEXAS,

Defendants.

Case No. A-06-CA-059-SS

ORDER

Before the Court are Plaintiff's Motion for Class Certification, filed March 23, 2006 [#17]; Plaintiffs Request for Evidentiary Hearing Regarding Class Action Certification, filed March 23, 2006 [#18]; Defendant's Response to Plaintiffs Motion for Class Certification, filed March 30, 2006 [#21]; Defendant's Motion and Brief for Partial Summary Judgment, filed April 5, 2006 [#24]; Plaintiffs Reply to Defendant's Response to Plaintiffs Motion for Class Certification, filed April 13, 2006 [#26]; Appendix to Plaintiffs Reply to Defendant's Response to Plaintiffs Motion for Class

Certification, filed April 13, 2006 [#27]; Plaintiffs Response to Defendant's Motion for Partial Summary Judgment and Brief in Support of Same, filed April 19, 2006 [#29]; Appendix to Plaintiffs Response to Defendant's Motion for Partial Summary Judgment and Brief in Support of Same, filed April 19, 2006 [#30]; and Defendants' Reply to Plaintiffs Response to Motion for Partial Summary Judgment, filed April 27, 2006 [#32]. Having considered the motion, response and reply thereto, the case file as a whole and the applicable law, the Court enters the following opinion and orders.

BACKGROUND

Plaintiff Darrell Arnett, as Administrator for the Estate of Jenni Arnett ("Arnett") filed this action on behalf of himself, and others similarly situated, against Defendants Carole Keeton Strayhorn ("Strayhorn"), in her official capacity as the Comptroller for the State of Texas ("Comptroller"), and the State of Texas. At issue is property the State of Texas holds pursuant to the Texas Unclaimed Property Law. This law requires various business organizations to report and deliver to the State Comptroller's office property considered to be unclaimed ("Unclaimed Property"). The Unclaimed Property consists of property owned by the business organization's clients or customers, for which there has been no activity for an extended period of time. TEX. PROP. CODE ANN. §§ 72.001-.103 & 73.002-.102 (Vernon Supp. 2005).

Once delivered to the Comptroller, the statute requires the Comptroller to sell the Unclaimed Property. *Id.* § 74.401. The proceeds from the sale are deposited to the credit of the general revenue

fund of the State of Texas. *Id.* § 74.601(b). The owners of the Unclaimed Property are entitled to submit a claim for return of the property at any time. If the State of Texas determines the claim is valid, the Unclaimed Property is returned, minus a handling fee if the property value exceeds $100. *Id.* § 75.501. A right of appeal is afforded any "person aggrieved by the decision of a claim filed" seeking the return of Unclaimed Property. *Id.* § 74.506.

Plaintiff alleges that, while held by the Comptroller, the Unclaimed Property generates revenue ("Revenue"). The Revenue generated may be in the form of interest, dividends or other appreciation. Plaintiff further asserts the Unclaimed Property generates millions of dollars of Revenue annually. (Plf. Compl. ¶ 15). However, according to Plaintiff, when the Unclaimed Property is returned to the owner, the State of Texas generally does not return the Revenue generated. Rather, the State of Texas retains the Revenue and uses it for general public purposes. (*Id.* ¶¶ 16-18).

Plaintiff asserts that, in his capacity as administrator for the estate of Jenni Arnett, he requested the return of $51,550.00, plus the interest thereon. The property had been held in trust by the State of Texas since at least 1999, resulting from previously unclaimed 50,000 shares of stock, originally held by Nationsbank of Georgia. Although the State of Texas returned the $51,550.00, Arnett never received the interest that had accrued. *(Id.* ¶ 7).

Plaintiff asserts this action on behalf of himself as well as members of a class he defines as including:

> all persons and/or entities who, within the

> relevant statutory period, if any, received from the State [of Texas] the return of their Unclaimed Property that had been held in trust by the State [of Texas] pursuant to the Unclaimed Property Law, but who did not receive the Revenue generated by their Unclaimed Property during the time it was held in trust by the State [of Texas].

(Id. ¶ 22).

Plaintiff first asserts a cause of action for violation of the prohibition against the taking of private property for public use without just compensation contained in the Fifth Amendment to the United States Constitution, incorporated as to the State of Texas by the Fourteenth Amendment. (*Id.* ¶¶ 25-33). He further claims the conduct of Defendants violates Article I, Section 17 of the Texas Constitution. (*Id.* ¶¶ 34-40). Plaintiff also asserts claims for unjust enrichment and breach of fiduciary duty under Texas state law. (*Id.* ¶¶ 41-51). As relief, Plaintiff seeks the return of the Revenue generated by the Unclaimed Property, as well as an injunction prohibiting the State of Texas from retaining any Revenue in the future, a declaratory judgment decreeing the Unclaimed Property Law unconstitutional, and an accounting from the State of Texas regarding Revenue generated by the Unclaimed Property of the members of the class defined by Plaintiff, as well as attorneys' fees under the Federal Declaratory Judgment Act. (*Id.* ¶¶ 20 & 52-62).

Defendant Strayhorn has now filed a motion for partial summary judgment. She seeks dismissal

of all of Plaintiffs claims seeking monetary relief under the doctrine of sovereign immunity. Plaintiff has filed a motion for certification of this case as a class action. He also requests an evidentiary hearing on the matter of class certification. The parties have filed responsive pleadings and the matter is now ripe for determination.

II. MOTION FOR PARTIAL SUMMARY JUDGMENT

A. Standard of Review

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A dispute is genuine only if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 2513 (1986).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." *Celotex Corp. v. Catreff*, 477 U.S. 317, 323,106 S. Ct. 2548, 2553 (1986). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S. Ct. 1348, 1355-56 (1986); *Wise v. E.I. Dupont de Nemours & Co.*, 58 F.3d 193, 195 (5th Cir.

1995). The non-movant must respond to the motion by setting forth particular facts indicating there is a genuine issue for trial. *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000). "After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." *Id.*

The parties may satisfy their respective burdens by tendering depositions, affidavits or other competent evidence. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). Unsubstantiated or conclusory assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994).

B. Discussion

Defendant Strayhorn contends she is entitled to immunity under the Eleventh Amendment from Plaintiff's claims seeking monetary relief. According to Strayhorn, because Plaintiff has sued her solely in her official capacity as the Comptroller for the State of Texas, she is entitled to invoke immunity under the Eleventh Amendment from all claims for monetary damages asserted against her in an official capacity suit.[1]

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[1] Strayhorn correctly limits her argument to Plaintiffs claims seeking monetary relief, acknowledging state agencies and officials are not protected in their official capacities from suit for injunctive relief. *Ex Parte Young*, 209 U.S. 123,155-56, 28 S. Ct. 441, 452 (1908); *Reickenbacker v. Foster*, 274 F.3d 974, 976 (5th Cir. 2001) (sovereign immunity is no bar to suits for injunctive relief against state

The Eleventh Amendment provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. AMEND. XI. The amendment acts to divest federal courts of jurisdiction over suits against a state. *Green v. State Bar*, 27 F.3d 1083, 1087 (5th Cir. 1994) (citing *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304, 110 S. Ct. 1868, 1871 (1990)). A suit against a state agency is an indirect suit against the state and, therefore, also barred. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 908 (1984); *Briggs v. Mississippi*, 331 F.3d 499, 503 (5th Cir. 2003) (Eleventh Amendment bars suit against state or state entity). A suit for damages against a state official in his official capacity is also deemed to be a suit against the state, and the official is thus entitled to invoke Eleventh Amendment immunity. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S. Ct. 2304, 2312 (1989).

Plaintiff, however, argues the monetary relief he seeks is not barred by the Eleventh Amendment. According to Arnett, his claim is not a request for public funds from the State of Texas. Rather, Arnett maintains because Unclaimed Property never becomes the property of the state, but is maintained in trust for the true owner, any Revenue flowing from the Unclaimed Property cannot be property of the State of Texas.

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officials).

Based on his characterization of the Unclaimed Property as "held in trust", Plaintiff argues the Eleventh Amendment case law cited by Defendant is distinguishable because the language references "public funds in the state treasury" and "the general revenues of the State." *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 1356 (1974). He contends the Unclaimed Property, and its Revenues, do not fall into those categories because they remain the property of the true owner, not the State of Texas.

Plaintiff's argument, however, fails to consider the language of the Texas statute in question. The statute provides in pertinent part:

> The comptroller shall deposit to the credit of the general revenue fund:
>
> > (1) all funds, including marketable securities, delivered to the comptroller under this chapter or any other statute requiring the delivery of unclaimed property to the comptroller;
> >
> > (2) all proceeds from the sale of any property, including marketable securities, under this chapter;

TEX. PROP. CODE ANN. § 74.601(b) (Vernon 2006). Pursuant to the clear language of this statute, Defendant deposited Plaintiff's Unclaimed Property in the general revenue fund. Once placed in the general revenue fund, the Unclaimed Property "is subject to appropriation by the legislature." *Id.* § 74.603.

More than sixty years ago the Supreme Court made clear "when the action is in essence one for the

recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit." *Ford Motor Co. v. Dept of Treasury*, 323 U.S. 459, 464, 65 S. Ct. 347, 350 (1945). Strayhorn, pursuant to state law, placed Plaintiff's Unclaimed Property in Texas' general revenue fund, i.e. the state treasury. Arnett now seeks monetary payment from Strayhorn, in the guise of Revenue generated by the Unclaimed Property. Because any such Revenue would also be part of the state treasury, Plaintiffs claim for this monetary relief is barred by the Eleventh. Amendment. *Edelman*, 415 U.S. at 663, 94 S. Ct. at 1356 (suit by private parties seeking to impose liability which must be paid from public funds in state treasury is barred by Eleventh Amendment).[2]

Arnett further relies on a recent case in which the Ninth Circuit found the California Controller was not entitled to invoke Eleventh Amendment immunity concerning a claim arising from unclaimed property. *Taylor v. Westly*, 402 F.3d 924 (9th Cir. 2005). The plaintiffs in *Taylor* argued their property, specifically shares of corporate stock, had been improperly taken by the Controller. They sued for "disgorgement and return of either their stock investment or the return of the reasonable value

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2 The Court additionally notes Plaintiff could have avoided the bar of the Eleventh Amendment by pursuing this action in Texas state court. He presumably could have, but apparently failed to, assert his claim for the Revenue from his Unclaimed Property in his state administrative claim. Nor does it appear Arnett exercised his appellate remedy on such a claim under the Unclaimed Property statute. *See* TEX. PROP. CODE ANN. § 74.506(b) (person aggrieved by decision under this chapter has right to appeal by filing suit in state district court). The statute specifically abolishes "the state's Immunity from suit without consent" for such suits. *Id.*

thereof, . . . [and] an injunction commanding the Controller to return their stock," among other relief. *Id.*, 402 F.3d at 929. The district court dismissed the action in its entirety as barred by the Eleventh Amendment. The Ninth Circuit reversed, holding:

> The plaintiffs' suit is not against the state treasury and is merely a suit for the return of their property. . . Because the plaintiffs seek genuinely prospective relief, and because the funds they seek are held by the state as custodian in trust for them rather than as the state's own funds, much as a municipality holds a car towed from an expired parking meter, the complaint should not have been dismissed under the Eleventh Amendment for lack of jurisdiction.

Id., 402 F.3d at 936.

Once again, however, Plaintiffs argument fails to consider the language of the Texas statute. The Ninth Circuit specifically looked to the language of the California statutes as "unambiguously providing] that the Controller and even the Treasurer holds property he or she takes as 'unclaimed' in trust," by using "[t]raditional trust language." *Id.*, 402 F.3d at 931. In contrast, as quoted above, the Texas statute directs the Comptroller to deposit unclaimed property in the State's general revenue fund, not in a separate trust fund for owners. *See Clark v.* Strayhorn, 184 S.W.3d 906, 912 (Tex. App.–Austin 2006, writ denied) (holding Texas unclaimed property statute has no provision for custodial trust). Absent the creation of a trust, the Eleventh Amendment would clearly act to bar Plaintiff's claims for monetary relief. *See Taylor*,

402 F.3d at 929-30 (generally, Eleventh Amendment shields state governments "from declaratory judgments against the state governments that would have the practical effect of requiring the state treasury to pay money to claimants"). *See also Paschal v. Jackson*, 936 F.2d 940, 944-45 (7th Cir. 1991) (declining to adopt analytical approach requiring examination of state's fiscal structure to determine source of funds, where a state "gets the money to satisfy a judgment is no concern of the plaintiff or the court; what matters is that the judgment runs against the state").

The trust fund argument also flies in the face of two Supreme Court decisions. In both cases, taxpayers sued state officials to recover taxes paid under protest. The states segregated the funds and held them in trust pending the outcome of the litigation. In both cases, the Court held the suits were against the state as an entity and thus barred by the Eleventh Amendment. *See Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573, 579-80, 66 S. Ct. 745, 748 (1946) (state statute permitting action to recover taxes paid under protest fell short of clear declaration by state of consent to be sued in federal courts); *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 55, 64 S. Ct. 873, 877 (1944) (same). Notably, the Supreme Court characterized the holding of the money "separate and apart by the collector," rather than in the general funds of the treasury, as an "immaterial difference." *Great Northern*, 322 U.S. at 53, 64 S. Ct. at 876. Accordingly, Strayhorn is entitled to the protection of the Eleventh Amendment in this action.

III. MOTION FOR CLASS ACTION CERTIFICATION

A. Standard of Review

Rule 23 of the Federal Rules of Civil Procedure sets forth the requirements for certification of a class action. The party seeking certification bears the burden of meeting these requirements. *O'Sullivan v. Countrywide Home Loans, Inc.*, 319 F.3d 732, 737-38 (5th Cir. 2003). The district court must conduct a "rigorous analysis" of the Rule 23 requirement before certifying a class, *Stirman v. Exxon Corp.*, 280 F.3d 554, 561-62 (5th Cir. 2002); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 740 (5th Cir.1996). Rule 23(a) requires numerosity of parties, commonality of law or fact issues, typicality of claims or defenses and adequacy of representation. FED. R. CIV. P. 23(a).[3] Once a plaintiff has met these prerequisites, he must also demonstrate he falls into one of the categories enumerated in Rule 23(b).[4]

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[3] Rule 23(a) specifically requires plaintiffs seeking to be certified as representatives of a class to establish: (1) the class is so numerous joinder of all members is impracticable; (2) there are common questions of law or fact to the class; (3) the claims or defenses of the representatives are typical of those of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. FED. R. CIV. P. 23(a).

[4] Rule 23(b) allows a class action to be maintained if:

> the prosecution of separate actions by or against individual members of the class would create a risk of
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for

B. Discussion

Defendants do not argue Plaintiff has failed to establish the first three prerequisites of Rule 23(a), namely numerosity, commonality and typicality. Rather, they contend Plaintiff is not an adequate class representative. Correctly predicting the Court's ruling above, concluding Plaintiff is barred from seeking monetary relief, Defendants maintain Arnett is not able to properly represent the interests of those seeking the only relief available, declaratory and/or

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> the party opposing the class, or
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests, or
>
> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole, or
>
> the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy, The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b).

prospective injunctive relief.

Plaintiff does not, nor does the Court reasonably believe he can, contend he will be likely to have property subject to the Texas Unclaimed Property Law in the future. Absent any such allegations, this Court would lack jurisdiction to entertain, because Plaintiff lacks standing to assert, a claim for prospective injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S. Ct. 1660, 1670 (1983) (plaintiffs assertion he may again be subject to illegal chokehold does not create actual controversy, absent sufficient likelihood he will again be wronged in similar way, plaintiff is not entitled to injunctive relief); Golden *v. Zwickler*, 394 U.S. 103, 109, 89 S. Ct. 956, 960 (1969) (plaintiff who was no longer likely to run for election had not presented case or controversy of "sufficient immediacy and reality" to allow declaratory judgment challenging constitutionality of statute prohibiting anonymous handbills directly pertaining to election campaigns); *Geiger* v. *Jowers*, 404 F.3d 371, 375 (5th Cir. 2005) (plaintiff lacked standing to seek prospective injunctive relief for a First Amendment violation where he has not shown or even alleged a likelihood of future harm by way of a real and immediate threat that defendants would violate his First Amendment rights in the future). Moreover, as noted above, Arnett would have an adequate remedy at law to seek relief in the future under the initial claim and appellate review provisions of the Unclaimed Property statute.

The Court's above ruling additionally undercuts the need for class certification of this action. The only issue remaining in this case is Plaintiffs challenge to the constitutionality of the

Texas Unclaimed Property statute. Class actions exist primarily, if not solely, to achieve a measure of judicial economy, preserving the resources of both the courts and the parties by permitting issues affecting all class members to be litigated in an efficient, expedited, and manageable fashion. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 410 (5th Cir. 1998). No useful purpose would be served by requiring this case to proceed as a class because all individuals who are not a part of this action, but who are aggrieved by the Texas Unclaimed Property Law in the same manner as Plaintiff, will have the benefit of this Court's ruling concerning the statute's constitutionality. *See, e.g., Aacen v. San Juan County Sheriff's Dep't*, 944 F.2d 691, 700 (10th Cir. 1991) (class action not required where same relief afforded class members without its use); *Berger v. Heckler*, 771 F.2d 1556, 1566 (2nd Cir. 1985) (class certification not necessary where relief will benefit all members of proposed class); *Dionne v. Bouley*, 757 F.2d 1344, 1355-56 (1st Cir. 1985) (denial of class certification proper where certification is merely formality or otherwise inappropriate); *Craft v. Memphis Light, Gas & Water Div.*, 534 F.2d 684, 686 (6th Cir. 1976), *affd*, 436 U.S. 1, 98 S. Ct. 1554 (1978) (class certification properly denied where constitutional determination applicable whether action treated as individual action or as class action). *See also United Farmworkers v. City of Delray Beach*, 493 F.2d 799, 812 (5th Cir. 1974) (refusing to reach propriety of class certification because nature of right sought to be vindicated requires decree to run to benefit of others similarly situated).[5] Accordingly,

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[5] The undersigned notes Plaintiff impliedly concedes the lack of necessity for class certification should the Court find the Eleventh Amendment applicable. By way of his reply, Arnett properly characterizes each of Defendants' objections to class certification as based on the applicability of sovereign immunity. His refutation is

Plaintiffs motion for class certification is without merit, and there is no need for an evidentiary hearing on the issue.

In accordance with the foregoing:

IT IS ORDERED that Defendant's Motion and Brief in for Partial Summary Judgment, [#24] is GRANTED; and

IT IS FURTHER ORDERED that Plaintiffs Motion for Class Certification [#17] and Plaintiffs Request for Evidentiary Hearing Regarding Class Action Certification [#18] are DENIED. SIGNED this the 16th day of May 2006.

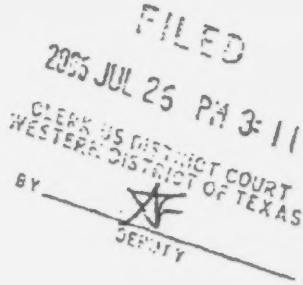
/s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT JUDGE

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limited to the same arguments he raises in response to the motion for summary judgment.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF AUSTIN DIVISION

DARRELL ARNETT, as Administrator of the Estate of JENNI ARNETT, and all others similarly situated,	:	
Plaintiff,	:	
-v. -	:	Case No. A-06-CA-059-SS
CAROLE KEETON STRAYHORN, as Comptroller for the State of Texas, and the STATE OF TEXAS,	:	
Defendants.	:	

ORDER

Before the Court are Defendant's Motion and Brief for Summary Judgment, filed June 8, 2006 [#35]; Plaintiffs' Cross-Motion and Brief for Summary Judgment, filed June 20, 2006 [#36]; Appendix to Plaintiffs' Cross-Motion and Brief for Summary Judgment, filed June 20, 2006 [#37]; Plaintiffs' Brief in Response to Defendant Strayhorn's Motion for Summary Judgment, filed June 20, 2006 [#38]; Appendix to Plaintiffs' Brief in Response to Defendant Strayhorn's Motion for Summary Judgment, filed June 20, 2006 [#39]; Defendant Comptroller's Response to Plaintiffs

Cross-Motion for Summary Judgment, filed June 27, 2006 [#40]; Defendant Comptroller's Reply to Plaintiff's Response to Defendant's Motion for Summary Judgment, filed June 27, 2006 [#41]; and Plaintiffs' Reply to Defendant Comptroller's Response to Plaintiffs Cross-Motion and Brief for Summary Judgment, filed July 11, 2006 [#42]. Having considered the motions, responses and replies thereto, the case file as a whole and the applicable law, the Court enters the following opinion and orders.

I. BACKGROUND

Plaintiff Darrell Amett, as Administrator for the Estate of Jenni Amett ("Arnett") filed this action on behalf of himself, and others similarly situated, against Defendants Carole Keeton Strayhorn ("Strayhornl, in her official capacity as the Comptroller for the State of Texas ("Comptroller"), and the State of Texas. At issue is property the State of Texas holds pursuant to the Texas Unclaimed Property Law. This law requires various business organizations to report and deliver to the State Comptroller's office property considered to be unclaimed ("Unclaimed Property"). The Unclaimed Property consists of property owned by the business organization's clients or customers, for which there has been no activity for an extended period of time. TEX. PROP. CODE ANN. §§ 72.001-.103 & 73.002-.102 (Vernon Supp. 2005).

Once delivered to the Comptroller, the statute requires the Comptroller to sell the Unclaimed Property. *Id.* § 74.401. The proceeds from the sale are deposited to the credit of the general revenue fund of the State of Texas. *Id.* § 74.601(b). The

owners of the Unclaimed Property are entitled to submit a claim for return of the property at any time. If the State of Texas determines the claim is valid, the Unclaimed Property is returned, minus a handling fee if the property value exceeds $100. *Id.* § 74.501. A right of appeal is afforded any "person aggrieved by the decision of a claim filed" seeking the return of Unclaimed Property. *Id.* § 74..506.

Plaintiff alleges that, while held by the Comptroller, the Unclaimed Property generates revenue ("Revenue"). The Revenue generated may be in the form of interest, dividends or other appreciation. Plaintiff further asserts the Unclaimed Property generates millions of dollars of Revenue annually. (Plf. Compl. ¶15). However, according to Plaintiff, when the Unclaimed Property is returned to the owner, the State of Texas generally does not return the Revenue generated. Rather, the State of Texas retains the Revenue and uses it for general public purposes. *(Id.* ¶¶ 16-18).

Plaintiff asserts that, in his capacity as administrator for the estate of Jenni Arnett, he requested the return of $51,550.00, plus the interest thereon. The property had been held in trust by the State of Texas since at least 1999, resulting from previously unclaimed shares of stock, originally held by Nationsbank of Georgia. Although the State of Texas returned the $51,550.00, Amett never received the accrued interest. *(Id.* ¶ 7).

Plaintiff first asserts a cause of action for violation of the prohibition against the taking of private property for public use without just compensation contained in the Fifth Amendment to the United States Constitution, incorporated as to

the State of Texas by the Fourteenth Amendment. (*Id.* ¶¶ 25-33). He further claims the conduct of Defendants violates Article I, Section 17 of the Texas Constitution. (*Id.* ¶¶ 34-40). Plaintiff also asserts claims for unjust enrichment and breach of fiduciary duty under Texas state law. (*Id.* ¶¶ 41-51). As relief, Plaintiff seeks the return of the Revenue generated by the Unclaimed Property, as well as an injunction prohibiting the State of Texas from retaining any Revenue in the future, a declaratory judgment decreeing the Unclaimed Property Law unconstitutional, and an accounting from the State of Texas regarding Revenue generated by the Unclaimed Property, as well as attorneys' fees under the Federal Declaratory Judgment Act. (*Id.* ¶¶ 20 & 52-62).

Defendant Strayhorn has now filed a motion for summary judgment. She argues this Court should dismiss this case for lack of jurisdiction because Plaintiff lacks standing. Plaintiff has filed a cross-motion for summary judgment in which he asks the Court to declare the Texas Unclaimed Property Law unconstitutional. The parties have filed responsive pleadings and the matters are now ripe for determination.

II. STANDARD OF REVIEW

Summary judgment is appropriate under Rule 56(c) of the Federal Rules of Civil Procedure only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A dispute is genuine only if the evidence is such that

a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S. Ct. 2505, 2513 (1986).

The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrates the absence of a genuine issue of material fact." Celotex *Corp. v. Catrett*, 477 U.S. 317, 323,106 S. Ct. 2548, 2553 (1986). The burden then shifts to the nonmoving party to establish the existence of a genuine issue for trial. *Matsushita Elec. Indus.* Co., *Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585-87, 106 S. Ct. 1348, 1355-56 (1986); *Wise v. E.L Dupont de Nernours &* Co., 58 F.3d 193, 195 (5th Cir. 1995). The non-movant must respond to the motion by setting forth particular facts indicating there is a genuine issue for trial. *Mississippi River Basin Alliance v. Westphal*, 230 F.3d 170, 174 (5th Cir. 2000). "After the non-movant has been given the opportunity to raise a genuine factual issue, if no reasonable juror could find for the non-movant, summary judgment will be granted." *Id.*

The parties may satisfy their respective burdens by tendering depositions, affidavits or other competent evidence. *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992). Unsubstantiated or conclusory assertions, improbable inferences, and unsupported speculation are not competent summary judgment evidence and thus are insufficient to defeat a motion for summary judgment. *Eason v. Thaler*, 73 F.3d 1322, 1325 (5th Cir. 1996); *Forsyth* v. *Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994).

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

As an initial matter, the Court notes Plaintiff originally asserted this action on behalf of himself as well as others he asserted were similarly aggrieved by the Unclaimed Property Law. The undersigned, however, denied Plaintiffs motion for class certification by order dated May 16, 2006. By way of the same order, the Court also dismissed all of Plaintiff's claims for monetary relief.

Defendant now seeks dismissal of this action in its entirety. Strayhorn maintains the only relief sought by Plaintiff remaining in this action is for prospective injunctive relief. She further contends the Court concluded in its previous order Plaintiff has no standing to seek such relief. Defendant thus concludes this action should be dismissed for lack of jurisdiction.

As Defendant correctly points out, however, the Court has neither directly addressed, nor specifically rejected, his claim for declaratory relief. He argues his challenge to the constitutionality of the Texas Unclaimed Property Law is still at issue in this action. Arnett contends dismissal would be improper because he has standing to seek such relief. He further contends any prior conclusion to the contrary was incorrect and should be overruled.

The Declaratory Judgment Act allows a federal court "[i]n a case of actual controversy within its jurisdiction," to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201. The "case of actual controversy" requirement in section 2201 is identical to the "case or controversy" requirement in Article III.

Lawson v. Callahan, 111 F.3d 403, 405 (5th Cir. 1997); *Texas v. West Publ'g Co.*, 882 F.2d 171, 175 (5th Cir. 1989). If Plaintiff does not satisfy the requirement, this Court is without jurisdiction.

To have Article III standing, Plaintiff must meet three required elements: (1) he must have suffered an "injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent"; (2) there is "a causal connection between the injury and the conduct complained of"; and (3) the injury is likely to be redressed by a favorable decision. *Fla. Dep't of Ins. v. Chase Bank of Tex. Nat'l Assn*, 274 F.3d 924, 929 (5th Cir. 2001) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136 (1992)). Further, where a plaintiff is seeking injunctive or declaratory relief, he must demonstrate there is a substantial likelihood he will suffer injury in the future. *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 458 (5th Cir. 2005); *Bauer v. Texas*, 341 F.3d 352, 357 (5th Cir. 2003).

Plaintiff argues he satisfies the requisite standing on two bases. First, he argues he has an ongoing concrete monetary harm in the form of the Revenue generated by his Unclaimed Property which he characterizes as improperly held by Defendants. Arnett admits this argument is contrary to this Court's previous ruling finding his claim for monetary relief against Strayhorn barred by the Eleventh Amendment. He asks the Court to reconsider the ruling, find the State holds his property in trust, and reinstate his claim for monetary relief.

In making his request for reconsideration,

however, Arnett cites to no new legal authority. Indeed, he concedes he makes no argument he has not previously presented the undersigned. Accordingly, the Court declines to reconsider the prior ruling.

Arnett further maintains the retention by the State of the Revenue constitutes an ongoing harm which declaratory relief would satisfy. Previously, in rejecting Plaintiff's motion for class certification, the Court stated:

> Plaintiff does not, nor does the Court reasonably believe he can, contend he will be likely to have property subject to the Texas Unclaimed Property Law in the future. Absent any such allegations, this Court would lack jurisdiction to entertain, because Plaintiff lacks standing to assert, a claim for prospective injunctive relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 111, 103 S. Ct. 1660, 1670 (1983) (plaintiff's assertion he may again be subject to illegal chokehold does not create actual controversy, absent sufficient likelihood he will again be wronged in similar way, plaintiff is not entitled to injunctive relief); *Golden v. Zwickler*, 394 U.S. 103, 109, 89 S. Ct. 956, 960 (1969) (plaintiff who was no longer likely to run for election had not presented case or controversy of "sufficient immediacy and reality" to allow declaratory judgment challenging constitutionality of statute prohibiting anonymous handbills directly pertaining to election campaigns); *Geiger v. Jowers*,

> 404 F.3d 371, 375 (5th Cir. 2005) (plaintiff lacked standing to seek prospective injunctive relief for a First Amendment violation where he has not shown or even alleged a likelihood of future harm by way of a real and immediate threat that defendants would violate his First Amendment rights in the future).

ORDER, 5/16/2006. Although the Court did not directly address Plaintiffs claim for declaratory relief in the prior ruling, the same analysis applies. To wit, to obtain equitable or declaratory relief for past wrongs, a plaintiff must demonstrate either continuing harm or a real and immediate threat of repeated injury in the future. *Bauer*, 341 F.3d at 358 (citing *Ashcroft v. Mattis*, 431 U.S. 171, 97 S. Ct. 1739 (1977)).

Plaintiff does not disagree with the Court as to the unlikelihood of his having other property in the future subject to the Texas statute. Rather, he contends, without this Court declaring the Unclaimed Property Law unconstitutional, he cannot seek monetary relief "whether it be through the State administrative system, State courts, or otherwise." (Plf. Resp. at 3). Notably, however, Arnett wholly fails to explain why such a declaration is a necessary prerequisite to suit in state court. As noted above, the Unclaimed Property Law has both initial claim and appellate review provisions. TEX. PROP. CODE ANN. § 74.501 (governing filing of claim); *id.* § 74.506 (granting right of appeal). Nothing in the statutory provision prevents assertion of a claim for the Revenue from Unclaimed Property in the state administrative process. Indeed, the statute

specifically abolishes "the state's immunity from suit without consent" for appeals filed byway of suit in state district court, *id.* § 74..506(b). Plaintiff has failed to establish he has suffered "an injury redressable by a judicial determination" as to the constitutionality of the Texas Unclaimed Property Law. *See Grant v. Gilbert*, 324 F.3d 383, 389 (5th Cir. 2003) (where plaintiff was eligible to apply for state services at time of filing suit, judicial declaration of eligibility was unnecessary, depriving plaintiff of standing to seek such relief). He therefore lacks standing to seek declaratory or injunctive relief in this action. Accordingly, Strayhorn is entitled to summary judgment.

IV. PLAINTIFFS' CROSS-MOTION FOR SUMMARY JUDGMENT

Plaintiff has also filed a cross-motion for summary judgment. He contends because the State takes only custody of, not title to, Unclaimed Property, the State's retention of the Revenue is an unconstitutional taking and violates due process. In light of the Court's conclusion that Arnett lacks standing to bring those claims, the Court need not, and indeed cannot, address the merits of Plaintiffs motion.

In accordance with the foregoing:

IT IS ORDERED that Defendant's Motion and Brief for Summary Judgment [#35] is GRANTED; and

IT IS FURTHER ORDERED that Plaintiffs' Cross-Motion and Brief for Summary Judgment E#361 is DENIED.

SIGNED this the 26th day of July 2006.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF AUSTIN DIVISION

FILED
2006 JUL 26 PM 3:11
CLERK US DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY
DEPUTY

DARRELL ARNETT, as Administrator of the Estate of JENNI ARNETT, and all others similarly situated,	
Plaintiff,	
-v. -	Case No. A-06-CA-059-SS
CAROLE KEETON STRAYHORN, as Comptroller for the State of Texas, and the STATE OF TEXAS,	
Defendants.	

JUDGMENT

BE IT REMEMBERED that on the 26th day of July, 2006, the Court entered its order granting summary judgment on behalf of Defendant Carole Keeton Strayhorn, and thereafter enters the following judgment:

IT IS ORDERED, ADJUDGED, and DECREED that Plaintiff Darrell Arnett TAKE NOTHING in this cause against Defendants Carole Keeton Strayhorn, as Comptroller for the State of Texas, and the State of Texas, and that all costs of suit are taxed against Plaintiff Darrell Arnett, for which let execution issue.

IT IS FURTHER ORDERED that all pending motions are terminated.

SIGNED on this the 26th day of July, 2006.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES DISTRICT JUDGE

APPENDIX E

SELECTED EXCERPTS FROM THE TEXAS UNCLAIMED PROPERTY ACT

Sec. 71.302. RECOVERY OF PERSONAL PROPERTY. (a) If in a suit filed under Section 71.301 the court finds that a claimant is entitled to recover personal property, the court shall order the comptroller to issue a warrant for payment of the claim without interest or costs.

(b) A copy of the order under seal of the court is sufficient voucher for issuing the warrant.

Sec. 72.101. PERSONAL PROPERTY PRESUMED ABANDONED. (a) Except as provided by this section and Sections 72.1015, 72.1016, and 72.102, personal property is presumed abandoned if, for longer than three years:

(1) the existence and location of the owner of the property is unknown to the holder of the property; and

(2) according to the knowledge and records of the holder of the property, a claim to the property has not been asserted or an act of ownership of the property has not been exercised.

(b) (1) The three-year period leading to a presumption of abandonment of stock or another intangible ownership interest in a business association, the existence of which is evidenced by records available to the association, commences on the first date that either a sum payable as a result of the ownership interest is unclaimed by the owner or a communication to the owner is returned undelivered by the United

States Postal Service.

(2) The running of the three-year period of abandonment ceases immediately on the exercise of an act of ownership interest or sum payable or a communication with the association as evidenced by a memorandum or other record on file with the association or its agents.

(3) At the time an ownership is presumed abandoned under this section, any sum then held for interest or owing to the owner as a result of the interest and not previously presumed abandoned is presumed abandoned.

(4) Any stock or other intangible ownership interest enrolled in a plan that provides for the automatic reinvestment of dividends, distributions, or other sums payable as a result of the ownership interest is subject to the presumption of abandonment as provided by this section.

(c) Property distributable in the course of a demutualization or related reorganization of an insurance company is presumed abandoned on the first anniversary of the date the property becomes distributable if, at the time of the first distribution, the last known address of the owner according to the records of the holder of the property is known to be incorrect or the distribution or statements related to the distribution are returned by the post office as undeliverable and the owner has not:

(1) communicated in writing with the holder of the property or the holder's agent regarding the interest; or

(2) otherwise communicated with the holder

regarding the interest as evidenced by a memorandum or other record on file with the holder or its agents.

(d) Property distributable in the course of a demutualization or related reorganization of an insurance company that is not subject to Subsection (c) is presumed abandoned as otherwise provided by this section.

Sec. 74.101. PROPERTY REPORT. (a) Each holder who on June 30 holds property that is presumed abandoned under Chapter 72, 73, or 75 of this code or under Chapter 154, Finance Code, shall file a report of that property on or before the following November 1. The comptroller may require the report to be in a particular format, including a format that can be read by a computer.

(b) Repealed by Acts 1999, 76th Leg., ch. 1208, Sec. 5, eff. Sept. 1, 1999.

(c) The property report must include:

(1) the name and social security number, if known, and the last known address, if any, of each person who, from the records of the holder of the property, appears to be the owner of the property, or the name and address, if known, of any person who is entitled to the property;

(2) a description of the property, the identification number, if any, and, if appropriate, a balance of each account, except as provided by Subsection (d);

(3) the date that the property became payable, demandable, or returnable;

(4) the date of the last transaction with the owner concerning the property; and

(5) other information that the comptroller by rule requires to be disclosed as necessary for the administration of this chapter.

(d) Amounts due that individually are less than $50 may be reported in the aggregate without furnishing any of the information required by Subsection (c).

Sec. 74.201. REQUIRED NOTICE. (a) Except as provided by Section 74.202, the comptroller may use one or more methods as necessary to provide the most efficient and effective notice to each reported owner in the calendar year immediately following the year in which the report required by Section 74.101 is filed. The notice must be provided:

(1) in the county of the property owner's last known address; or

(2) in the county in which the holder has its principal place of business or its registered office for service in this state, if the property owner's last address is unknown.

(b) The notice must state that the reported property is presumed abandoned and subject to this chapter and must contain:

(1) the name and city of last known address of the reported owner;

(2) a statement that, by inquiry, any person possessing a legal or beneficial interest in the reported property may obtain information concerning the

amount and description of the property; and

(3) a statement that the person may present proof of the claim and establish the person's right to receive the property.

(c) Deleted by Acts 1997, 75th Leg., ch. 1037, Sec. 21, eff. Sept. 1, 1997.

(d) The comptroller may offer for sale space for suitable advertisements in a notice published under this section.

Sec. 74.202. NOTICE FOR ITEM WITH VALUE OF LESS THAN $100 . In the notice required by Section 74.201, the comptroller is not required to publish information regarding an item having a value that is less than $100 unless the comptroller determines that publication of that information is in the public interest.

Sec. 74.203. AUTHORIZED NOTICE. (a) During the calendar year immediately following the year in which the report required by Section 74.101 is filed, notice may be mailed to each person who has been reported with a Texas address and appears to be entitled to the reported property.

Sec. 74.205. CHARGE FOR NOTICE. The comptroller may charge the following against the property delivered under this chapter:

(1) expenses incurred for the publication of notice required by Section 74.201; and

(2) the amount paid in postage for the notice to the owner required by Section 74.203.

Sec. 74.301. DELIVERY OF PROPERTY TO COMPTROLLER . (a) Except as provided by Subsection (c), each holder who on June 30 holds property that is presumed abandoned under Chapter 72, 73, or 75 shall deliver the property to the comptroller on or before the following November 1 accompanied by the report required to be filed under Section 74.101.

(b) If the property subject to delivery under Subsection (a) is stock or some other intangible ownership interest in a business association for which there is no evidence of ownership, the holder shall issue a duplicate certificate or other evidence of ownership to the comptroller at the time delivery is required under this section.

(c) If the property subject to delivery under Subsection (a) is the contents of a safe deposit box, the comptroller may instruct a holder to deliver the property on a specified date before November 1 of the following year.

Sec. 74.3011. DELIVERY OF MONEY TO RURAL SCHOLARSHIP FUND. (a) Notwithstanding and in addition to any other provision of this chapter or other law, a local telephone exchange company may deliver reported money to a scholarship fund for rural students instead of delivering the money to the comptroller as prescribed by Section 74.301.

(b) A local telephone exchange company may deliver the money under this section only to a scholarship fund established by one or more local telephone exchange companies in this state to enable needy students from rural areas to attend college, technical school, or another postsecondary educational institution.

(c) A local telephone exchange company shall file with the comptroller a verification of money delivered under this section that complies with Section 74.302.

(d) A claim for money delivered to a scholarship fund under this section must be filed with the local telephone exchange company that delivered the money. The local telephone exchange company shall forward the claim to the administrator of the scholarship fund to which the money was delivered. The scholarship fund shall pay the claim if the fund determines in good faith that the claim is valid. A person aggrieved by a claim decision may file a suit against the fund in a district court in the county in which the administrator of the scholarship fund is located in accordance with Section 74.506.

(e) The comptroller shall prescribe forms and procedures governing this section, including forms and procedures relating to:

(1) notice of presumed abandoned property;

(2) delivery of reported money to a scholarship fund; and

(3) filing of a claim.

(f) In this section, "local telephone exchange company" means a telecommunications utility certificated to provide local exchange service within the state and that is a telephone cooperative or has fewer than 50,000 access lines in service in this state.

(g) During a state fiscal year, the total amount of money that may be transferred by all local

telephone exchange companies under this section may not exceed $400,000. The comptroller shall keep a record of the total amount of money transferred annually. When the total amount of money transferred during a state fiscal year equals the amount allowed by this subsection, the comptroller shall notify each local telephone exchange company that the company may not transfer any additional money to the company's scholarship fund during the remainder of that state fiscal year.

Sec. 74.3012. DELIVERY OF MONEY TO URBAN SCHOLARSHIP FUND.

(a) Notwithstanding and in addition to any other provision of this chapter or other law, a local exchange company may deliver reported money to a scholarship fund for urban students instead of delivering the money to the comptroller as prescribed by Section 74.301.

(b) A local exchange company may deliver the money under this section only to a scholarship fund established by one or more local exchange companies in this state to enable needy students from urban areas to attend college, technical school, or another postsecondary educational institution.

(c) A local exchange company shall file with the comptroller a verification of money delivered under this section that complies with Section 74.302.

(d) A claim for money delivered to a scholarship fund under this section must be filed with the local exchange company that delivered the money. The local exchange company shall forward the claim to the administrator of the scholarship fund to which the money was delivered. The scholarship fund shall pay

the claim if the fund determines in good faith that the claim is valid. A person aggrieved by a claim decision may file a suit against the fund in a district court in the county in which the administrator of the scholarship fund is located in accordance with Section 74.506.

(e) The comptroller shall prescribe forms and procedures governing this section, including forms and procedures relating to:

(1) notice of presumed abandoned property;

(2) delivery of reported money to a scholarship fund; and

(3) filing of a claim.

(f) In this section, "local exchange company" means a telecommunications utility certificated to provide local exchange telephone service within the state and that has 50,000 or more access lines in service in this state and is not a telephone cooperative.

(g) During each state fiscal year, the total amount of money that may be transferred by all local exchange companies under this section may not exceed the total amount of money transferred to rural scholarship funds under Section 74.3011 during the previous state fiscal year. The comptroller shall keep a record of the total amount of money transferred annually. If the total amount of money transferred during a state fiscal year equals the amount allowed by this subsection, the comptroller shall notify each local exchange company that the company may not transfer any additional money to the company's scholarship fund during the remainder of that state fiscal year.

Sec. 74.3013. DELIVERY OF MONEY FOR RURAL SCHOLARSHIP AND ECONOMIC DEVELOPMENT. (a) Notwithstanding and in addition to any other provision of this chapter or other law, a nonprofit cooperative corporation may deliver reported money to a scholarship fund for rural students or to stimulate rural economic development instead of delivering the money to the comptroller as prescribed in Section 74.301.

(b) A nonprofit cooperative corporation may deliver the money under this section only:

(1) to a scholarship fund established by one or more nonprofit cooperative corporations in this state to enable students from rural areas to attend college, technical school, or other postsecondary educational institution; and

(2) to an economic development fund for the stimulation and improvement of business and commercial activity for economic development in rural communities.

(c) A nonprofit cooperative corporation shall file with the comptroller a verification of money delivered under this section that complies with Section 74.302.

(d) A claim for money delivered under this section must be filed with the nonprofit cooperative corporation that delivered the money. A nonprofit cooperative corporation shall forward the claim to the administrator of the fund to which the money was delivered. The fund shall pay the claim if the fund determines in good faith that the claim is valid. A person aggrieved by a claim decision may file a suit against the fund in a district court in the county in

which the administrator of the fund is located in accordance with Section 74.506.

(e) The comptroller shall prescribe forms and procedures governing this section, including forms and procedures relating to:

(1) notice of presumed abandoned property;

(2) delivery of reported money to a scholarship or economic development fund;

(3) filing of a claim; and

(4) procedures to allow equitable opportunity for participation by each nonprofit cooperative corporation in the state.

(f) During a state fiscal year the total amount of money that may be transferred by all nonprofit cooperative corporations under this section may not exceed $1 million. No more than 20 percent of each nonprofit cooperative's funds eligible for delivery under this section shall be used for economic development. The comptroller shall adopt procedures to record the total amount of money transferred annually to allow equitable opportunity for participation with preference given to corporations already providing similar scholarship opportunities in other states.

(g) Nonprofit cooperative corporations may combine economic development funds from other sources with any economic development funds delivered under this section. In addition, such cooperatives may engage in other business and commercial activities, in their own behalf or through

such subsidiaries and affiliates as deemed necessary, in order to provide and promote educational opportunities and to stimulate rural economic development.

(h) In this section, a nonprofit cooperative corporation means a cooperative corporation organized under Chapters 51 and 52, Agriculture Code, the Texas Non-Profit Corporation Act (Article 1396-1.01 et seq., Vernon's Texas Civil Statutes), the Cooperative Association Act (Article 1396-50.01, Vernon's Texas Civil Statutes), and Chapter 161, Utilities Code.

Sec. 74.304. RESPONSIBILITY AFTER DELIVERY. (a) If reported property is delivered to the comptroller, the state shall assume custody of the property and responsibility for its safekeeping.

(b) A holder who delivers property to the comptroller in good faith is relieved of all liability to the extent of the value of the property delivered for any claim then existing, that may arise after delivery to the comptroller, or that may be made with respect to the property

(c) If the holder delivers property to the comptroller in good faith and, after delivery, a person claims the property from the holder or another state claims the property under its laws relating to escheat or unclaimed property, the attorney general shall, on written notice of the claim, defend the holder against the claim, and the holder shall be indemnified from the unclaimed money received under this chapter or any other statute requiring delivery of unclaimed property to the comptroller against any liability on the claim.

(d) The comptroller is not, in the absence of negligence or mishandling of the property, liable to the

person who claims the property for damages incurred while the property or the proceeds from the sale of the property are in the comptroller's possession. But in any event the liability of the state is limited to the extent of the property delivered under this chapter in the possession of the comptrolle-27)at the time a suit is filed.

(e) For the purposes of this section, payment or delivery is made in good faith if:

(1) payment or delivery was made in a reasonable attempt to comply with this chapter;

(2) the holder delivering the property was not a fiduciary then in breach of trust with respect to the property and had a reasonable basis for believing based on the facts then known to the holder that the property was abandoned or inactive for purposes of this chapter; and

(3) there is no showing that the records under which the delivery was made did not meet reasonable commercial standards of practice in the industry.

(f) On delivery of a duplicate certificate or other evidence of ownership to the comptroller under Subsection (b) of Section 74.301, the holder and any transfer agent, registrar, or other person acting for or on behalf of a holder in executing or delivering the duplicate certificate are relieved of all liability of every kind in accordance with this section to any person, including any person acquiring the original certificate or the duplicate of the certificate issued to the comptroller, for any losses or damages resulting to any person by the issuance and delivery to the comptroller of the duplicate certificate.

Sec. 74.307. LIST OF OWNERS. (a) The comptroller shall compile and revise each year, except as to amounts reported in the aggregate, an alphabetical list of the names and last known addresses of the owners listed in the reports and the amount credited to each account.

(b) The comptroller shall make the list available for public inspection during all reasonable business hours.

Sec. 74.401. SALE OF PROPERTY. (a) Except as provided by Subsection (c) or Section 74.404, the comptroller shall sell at public sale all personal property, other than money and marketable securities, delivered to the comptroller in accordance with Section 74.301. The comptroller shall conduct the sale in the city in this state that the comptroller determines affords the most favorable market for the particular property.

(b) The comptroller shall sell the property to the highest bidder. If the comptroller determines that the highest bid is insufficient, the comptroller may decline that bid and offer the property for public or private sale.

(c) The comptroller is not required to offer property for sale if the property belongs to a person with an address outside this state or the comptroller determines that the probable cost of the sale of the property exceeds its value.

(d) If after investigation the comptroller determines that property delivered from a safe deposit box or other repository has insubstantial commercial value, the comptroller may destroy or otherwise dispose of the property at any time.

(e) A person may not maintain any action or proceeding against the state, an officer of the state, or the holder of property because of an action taken by the comptroller under this section.

Sec. 74.501. CLAIM FILED WITH COMPTROLLER. (a) The comptroller shall review the validity of each claim filed under this section.

If the comptroller determines that a claim is valid, the comptroller or the comptroller's authorized agent shall approve the claim. If the claim is for money and has been approved under this section, the comptroller shall pay the claim. If a claim is for personal property other than money and has been approved under this section, the comptroller shall deliver the property to the claimant unless the comptroller has sold the property. If the property has been sold under Section 74.401, the comptroller shall pay to the claimant the proceeds from the sale.

(c) All claims to which this section applies must be filed in accordance with procedures, contain the information, and be on forms prescribed by the comptroller.

(d) On receipt of a claim form and all necessary documentation and as may be appropriate under the circumstances, the comptroller may approve the claim of:

(1) the reported owner of the property;

(2) if the reported owner died testate:

(A) the appropriate legal beneficiaries of the owner as provided by the last will and testament of the owner that has been accepted

into probate or filed as a muniment of title; or

(B) the executor of the owner's last will and testament who holds current letters testamentary;

(3) if the reported owner died intestate:

(A) the legal heirs of the owner as provided by Section 38, Texas Probate Code; or

(B) the court-appointed administrator of the owner's estate;

(4) the legal heirs of the reported owner as established by an affidavit of heirship order signed by a judge of the county probate court or by a county judge;

(5) if the reported owner is a minor child or an adult who has been adjudged incompetent by a court of law, the parent or legal guardian of the child or adult;

(6) if the reported owner is a corporation:

(A) the president or chair of the board of directors of the corporation, on behalf of the corporation; or

(B) any person who has legal authority to act on behalf of the corporation;

(7) if the reported owner is a corporation that has been dissolved or liquidated:

(A) the sole surviving shareholder of the corporation, if there is only one surviving shareholder;

(B) the surviving shareholders of the corporation in proportion to their ownership of the corporation, if there is more than one surviving shareholder;

(C) the corporation's bankruptcy trustee; or

(D) the court-ordered receiver for the corporation; or

(8) any other person that is entitled to receive the unclaimed property under other law or comptroller policy.

(e) Except as provided by Subsection (f), the comptroller may not pay to the following persons a claim to which this section applies:

(1) a creditor, a judgment creditor, a lienholder, or an assignee of the reported owner or of the owner's heirs; or

(2) a person holding a power of attorney from the reported owner or the owner's heirs.

(f) The comptroller may approve a claim for child support arrearages owed by the reported owner of the property and reflected in a child support lien notice that complies with Section 157.313, Family Code. A claim under this subsection may be submitted by the lienholder or the attorney general on behalf of the lienholder.

74.502. CLAIM FILED WITH HOLDER. (a) If a claim is filed with a holder under this section and the holder determines in good faith that the claim is valid, the holder may pay the amount of the claim.

(b) The comptroller shall reimburse the holder for a valid claim paid under this section.

(c) The request from a holder for reimbursement must be filed in accordance with procedures and on forms prescribed by the comptroller.

Sec. 74.504. HEARING. (a) The comptroller may hold a hearing and receive evidence concerning a claim filed under this subchapter.

(b) If the comptroller considers that a hearing is necessary to determine the validity of a claim, the comptroller shall sign the statement of the findings and the decision on the claim. The statement shall report the substance of the evidence heard and the reasons for the decision. The statement is a public record.

(c) If the comptroller determines that a claim is valid, the comptroller shall approve and sign the claim.

Sec. 74.509. HANDLING FEE FOR PROCESSING UNCLAIMED PROPERTY. A handling fee may be deducted from the amount of the claim payment if the payment is at least $100.

Sec. 74.601. UNCLAIMED MONEY. (a) The comptroller shall maintain a record that documents unclaimed money received under this chapter or any other statute requiring the delivery of unclaimed property to the comptroller.

(b) The comptroller shall deposit to the credit of the general revenue fund:

(1) all funds, including marketable

securities, delivered to the comptroller under this chapter or any other statute requiring the delivery of unclaimed property to the comptroller;

(2) all proceeds from the sale of any property, including marketable securities, under this chapter;

(3) all funds that have escheated to the state under Chapter 71, except that funds relating to escheated real property shall be deposited according to Section 71.202; and

(4) any income derived from investments of the unclaimed money.

(c) The comptroller shall keep a separate record and accounting for delivered unclaimed property, other than money, before its sale.

(d) Except as provided by Subsection (e), the comptroller shall from time to time invest the amount of unclaimed money in investments approved by law for the investment of state funds.

(e) The comptroller may from time to time sell securities, including stocks, bonds, and mutual funds, received under this chapter or any other statute requiring the delivery of unclaimed property to the comptroller and use the proceeds to buy, exchange, invest, or reinvest in marketable securities. When making or selling the investments, the comptroller shall exercise the judgment and care of a prudent person.

(f) The comptroller shall keep a separate record and accounting for securities delivered, sold, purchased, or exchanged and the proceeds and

earnings from the securities.

Sec. 74.602. USE OF MONEY. Except as provided by Section 381.004, Local Government Code, the comptroller shall use the unclaimed money received under this chapter or any other statute requiring the delivery of unclaimed property to the comptroller to pay the claims of persons or states establishing ownership of property in the possession of the comptroller under this chapter or under any other unclaimed property or escheat statute.

APPENDIX F



STAKE A CLAIM

Take Your Cash

TEXAS UNCLAIMED PROPERTY

Over $1.3 Billion Remains Unclaimed!

It's Your Money!

Financial institutions and businesses report unclaimed cash and liabilities to the state every day—from unclaimed checks, deposits, or refunds, to the contents of forgotten safe deposit boxes. This is valuable property that may have slipped through your fingers, and we want you to have it back. Each year we publish a list of abandoned property reported to us with the hope that you will find your name and claim your money.

Look for your name or business name on this list under the city in which you are currently living or under any other Texas cities where you have lived in the past. If the state is holding property that belongs to you, we want to help you get it back.

It's Never Too Late To Get It Back!

Over the past year, we returned more than $87 million of unclaimed property to claimants or their heirs. If you find your name on this list, or if you have found your name in the past but never followed up, your money will be here until you claim it. Visit our Web site or call us toll free. You can also search for your unclaimed property by name and/or city by visiting our online database at:

www.window.state.tx.us/up

The Web site allows you to view additional information to assist you in deciding whether to file a claim for the property. If you decide to file a claim, select the property and follow the corresponding directions to receive a claim form.

Contact:

Carole Keeton Strayhorn
Texas Comptroller

www.window.state.tx.us/up

or call nationwide at

1-800-654-3463

You can call the direct line at 512/463-3120, or write: Texas Comptroller of Public Accounts, Unclaimed Property Research and Correspondence Section, Post Office Box 12019, Austin, Texas 78711-2019, or e-mail us at unclaimed.property@cpa.state.tx.us.

It's your money. We want to help you get it back.

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BEST AVAILABLE COPY



A MESSAGE FROM
- CAROLE KEETON STRAYHORN

Lose Track of Something Valuable?

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APPENDIX G

Unclaimed Property

Search Online for Your Property

General Information

Reclaiming Your Property

Special Notices

Proving Ownership

Check Your Claim Status

Holder Information

Voluntary Disclosure Agreement

Unclaimed Property Auction

For and About Heirfinders

Links for Holocaust Victims

Other Unclaimed Property Sites

Contact Unclaimed Property

A Message from Texas Comptroller Carole Keeton Strayhorn

Dear Fellow Texan:

From a long-dormant bank account to a forgotten utility deposit or family heirloom in an abandoned safe deposit box, the state may be holding valuable property that belongs to you. If so, I want to return your property to you.

In today's mobile society, Texans can easily lose track of uncashed stock dividend checks, insurance proceeds, utility and rent deposits, and other assets that may escape attention.

As Texas Comptroller, I am responsible for collecting these abandoned assets. I am committed to returning them to their rightful owners.

Click Here to find out if unclaimed property is being held for you.

Sincerely,

Carole Keeton Strayhorn

Carole Keeton Strayhorn
Texas Comptroller



General Information

What is unclaimed property?

Unclaimed Property can be any financial asset that appears to have been abandoned by the owner for more than one year. Some examples of property that can become abandoned are:

- Dividend, payroll or cashier's checks
- Stocks, mutual fund accounts, bonds
- Utility deposits and other refunds
- Bank accounts and safe deposit box contents
- Insurance proceeds
- Mineral interest or royalty payments
- Court deposits, trust funds, escrow accounts

Why does it come to the State?

The unclaimed property law requires financial institutions, businesses, and government entities to report to the state, personal property they are holding that is considered abandoned or unclaimed.

The Texas Comptroller of Public Accounts is responsible for administering the Texas Unclaimed Property Program. Property is turned over to the Comptroller's office annually when the owner's whereabouts are unknown and the property has been inactive on the books of the reporting company after the appropriate abandonment period has run.

Unclaimed Property Statutes

Chapters 72 through 75 of the Texas Property Code govern the State of Texas Unclaimed Property Program. To view the statutes applying to the abandonment of property, property held by financial institutions, report delivery and claim process, or Texas minerals, go to the Texas Property Code and scroll down to Title 6, Unclaimed Property, then click on the appropriate chapter.

Chapter 76 of the Texas Property Code governs the Texas county, municipality, and independent school district (ISD) programs. To view the statute applying to the report, delivery, and claims process for properties held at the county, municipality, and ISD level, go to the Texas Property Code and scroll down to Title 6, Unclaimed Property, then, click on the link to Chapter 76.

Is there a time limit for claiming my property?

No, the Comptroller's office acts only as custodian for the missing owners, holding the property in trust until it is claimed. Texas never takes legal ownership of the property, so there is no time limit for filing a claim.

What efforts are made to find owners?

- A newspaper insert is published annually listing the owner names reported each year.
- An annual exhibit at the Texas State Fair provides searches of the Comptroller's database of owners.
- Notices may be mailed to owners reported with complete last known addresses
- In addition, this web site provides a database search feature for you to locate property that may be yours.
